BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

AMY LOU VOIERS	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,002,537
D & A MARKET	)	
Respondent	)	
AND	)	
	)	
BENCHMARK INSURANCE COMPANY	)	
Insurance Carrier	)	

ORDER

Respondent and its insurance carrier appealed the September 18, 2003 Award entered by Administrative Law Judge Brad E. Avery. The Board placed this appeal on its summary docket for disposition without oral argument as such argument was deemed unnecessary in light of the parties' briefs to the Board. For purposes of K.S.A. 2002 Supp. 44-551(b)(1), December 9, 2003, is the date arguments were deemed presented to the Board.

APPEARANCES

Paul D. Post of Topeka, Kansas, appeared for claimant. Victor B. Finkelstein of Kansas City, Missouri, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The record considered by the Board and the parties' stipulations are listed in the Award.

ISSUES

Claimant alleges she injured her back on August 4, 2000, when she lifted a box of canned goods while working for respondent. In the September 18, 2003 Award, Judge Avery determined claimant sustained an 11 percent functional impairment due to that accident. The Judge also determined claimant's average weekly wage for purposes of this claim was $334 and that claimant was entitled to $500 in unauthorized medical benefits.

Respondent and its insurance carrier contend Judge Avery erred. They first argue claimant failed to prove that she sustained any permanent impairment due to the August 4, 2000 accident. Rather, they argue claimant had a five percent preexisting functional impairment before the August 2000 accident and subsequently sustained another back injury on April 6, 2002, which resulted in an ultimate 10 percent whole body functional impairment. Accordingly, respondent and its insurance carrier contend claimant should not be awarded any permanent partial general disability benefits.

Regarding the average weekly wage, respondent and its insurance carrier contend claimant's average weekly wage was $274.31 until her fringe benefits were terminated after she left respondent's employment allegedly in January 2002. Accordingly, they argue the correct compensation rate for any disability benefits awarded claimant is only $182.88 per week.

Finally, respondent and its insurance carrier argue claimant should not be awarded $500 in unauthorized medical expense as Dr. Patrick E. Murray's chiropractic bills for which claimant sought payment did not separate the charges for low back treatment from the charges for treatment to the thoracic and cervical spine.

Conversely, claimant argues her average weekly wage for purposes of this claim is $337.93 and that she left respondent's employment in January 2001, rather than January 2002. Claimant also disputes that she had any preexisting functional impairment due to her low back or that she reinjured her back in any accident following the August 2000 lifting incident.

Accordingly, claimant contends that she is entitled to receive benefits for an 11 percent whole body functional impairment as a result of the August 4, 2000 accident. Finally, claimant argues that she is entitled to $500 in unauthorized medical benefits as Dr. Murray testified that all of the bills in question were related to claimant's August 2000 accident. Consequently, claimant requests this Board to correct the September 18, 2003 Award by applying the proper disability compensation rate.

The issues before the Board on this appeal are:

1. What is claimant's average weekly wage and what is the appropriate disability compensation rate for the benefits that claimant may be entitled to receive in this claim?

2. What is the nature and extent of injury and impairment, if any, that arose from the August 4, 2000 accident?

3. Is claimant entitled to receive $500 in unauthorized medical benefits for the chiropractic treatment administered by Dr. Patrick E. Murray?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record and the parties' arguments, the Board finds and concludes:

On August 4, 2000, claimant injured her back while working for respondent, D & A Market. The parties stipulated that claimant's accident arose out of and in the course of her employment. The accident occurred when claimant, who worked as a checker and also stocked shelves, lifted an egg box filled with canned goods.

After the lifting incident, claimant experienced pain in the middle of her low back, which radiated down into her right leg. According to claimant, this was the first occasion that she had experienced low back pain, although she testified that she had experienced right hip problems that began several years before, which her family doctor, Dr. Thomas Hamilton, had diagnosed as arthritis. But those symptoms had allegedly resolved before the August 2000 incident, although claimant acknowledged that she had intermittently sought treatment or medications from her doctor between January 1998 and June 2000. Claimant also testified that she could not recall experiencing problems in her legs or feet until the August 4, 2000 incident.

After the August 4, 2000 lifting incident, claimant returned to Dr. Hamilton when her back symptoms worsened to the point that she could hardly walk. Dr. Hamilton did not testify but it appears claimant saw him on September 7, 2000, complaining of low back and hip pain. Further, claimant saw the doctor several times and he scheduled an MRI.

In early October 2000,[1] claimant saw Dr. Ebelke at the request of respondent and its insurance carrier. Dr. Ebelke did not testify but, according to claimant, the doctor did not provide her with any treatment but only examined her. Claimant also testified that Dr. Ebelke told her she did not have arthritis in her hip as she had been previously advised.

Respondent and its insurance carrier then referred claimant to Dr. Hendler for treatment. Dr. Hendler did not testify but it appears the doctor saw claimant in October 2000 and prescribed physical therapy and medications. According to claimant, the physical therapy provided some relief. Dr. Hendler initially released claimant to return to work with restrictions and later, in late November 2000, released claimant to full duty.

[1] The record is not consistent as to when claimant saw Dr. Ebelke but this date is consistent with the histories taken by the various doctors and, also, is the date indicated in Dr. Bieri's deposition at page 30.

According to claimant, Dr. Hendler advised her to return to see him in six weeks if she continued to have problems but a nurse representing respondent's insurance carrier later telephoned her and advised the insurance carrier was closing its case as claimant's condition had improved.

After receiving 11.71 weeks of temporary total disability benefits, claimant returned to work for respondent in either late November 2000 or early December 2000. Although continuing to work for respondent until leaving respondent's employ in either January 2001 or 2002, claimant testified that she had intermittent back symptoms. According to claimant, upon her return to work she refused to do any of the heavy lifting but, instead, relied upon her coworkers to do that.

After returning to her regular work duties, claimant's back symptoms flared. Nonetheless, claimant did not request respondent and its insurance carrier for additional medical treatment as she believed her case had been closed. Claimant explained that the nurse who had managed her medical care had told her that her case was being closed. Moreover, the same nurse had also previously advised claimant that she could not leave work despite having significant pain. Accordingly, claimant believed her only option was to live with her symptoms. Claimant testified, in part:

> Q. (Mr. Finkelstein) Okay, and within that six weeks before she told you that [the case was being closed], okay, six weeks or however long before she told you that, had you requested to go back to see Dr. Hendler?
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> A. (Claimant) I hadn't been back to work long when I told Kevin [a supervisor] my back was hurting me real bad, and I was at the store crying with my back, and I called Diane on the phone and told her, and she said, "Well, you have to stay." They both -- Kevin and her both told me I had to stay at work.
>
> Judge Avery: Diane being who?
>
> The Witness: The workmen's comp nurse, which is the one that called me and told me she closed my case. So when I was told that, I just assumed that I had to learn to live with the pain.[2]

Following the August 2000 lifting incident and her return to work, claimant's back symptoms waxed and waned. Eventually, on April 8, 2002, claimant sought chiropractic treatment from Dr. Patrick E. Murray.

[2] R.H. Trans. at 46-47.

Claimant denies experiencing any particular event that caused her symptoms to flare shortly before seeing Dr. Murray. Moreover, claimant specifically denies squatting and hurting her back on the Saturday before seeing Dr. Murray. Claimant testified, in part:

> Q. (Mr. Finkelstein) Okay. Do you recall a couple of days before you started seeing Dr. Murray in April 2002 having an incident where you bent or squatted down and your back popped?
>
> A. (Claimant) No.
>
> Q. Do you recall telling Dr. Murray that a couple days before you first went to see him, that you had an incident where you squatted down or bent down and your back popped?
>
> A. When I called and made my appointment, I told them when I had initially hurt my back, I squatted down, and when I picked up the box, that my back popped. Now, I don't know if he misunderstood me or not.[3]

According to the medical bills introduced at the regular hearing, claimant saw Dr. Murray eight times in April 2002 and two times in May 2002. Claimant discontinued treatment with Dr. Murray as she could not afford it. It is Dr. Murray's treatment for which claimant now requests $500 in unauthorized medical benefits.

As indicated above, in either January 2001 or 2002 claimant left respondent's employment. Claimant's August 2000 back injury was not a factor in her leaving respondent's employ but, instead, claimant left as she had lost her insurance benefits. On a date that is not disclosed in the record, claimant began working for another supermarket where she obtained lighter work preparing food in that store's delicatessen. The new employer paid claimant $7 per hour and, more importantly, provided claimant with insurance benefits. When claimant testified at the regular hearing, she was continuing to work for her new employer. Accordingly, claimant requests permanent partial general disability benefits based on her permanent functional impairment rating.[4]

Average weekly wage

Claimant began working for respondent on June 1, 2000, when new owners began operating the supermarket where claimant was employed. Respondent employed claimant

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[3] *Id.* at 37.

[4] See K.S.A. 44-510e.

on a full-time basis, paying her $6.75 per hour. Respondent also paid claimant overtime and paid a portion of claimant's health insurance.

According to the wage statement introduced at the May 2003 regular hearing, respondent paid claimant $24.51 in overtime pay for the approximate eight-week period that claimant worked for respondent before the August 4, 2000 accident. That sum equates to $3.06 per week in overtime pay. The wage statement also indicates respondent paid $64 per week in fringe benefits. Claimant does not contest the accuracy of the information contained in the wage statement.

The record is not clear when claimant left respondent's employment or when respondent terminated her insurance benefits, as claimant testified:

> Q. (Mr. Post) All right. Did that [the employer-paid insurance benefits] continue until about the time that you left your employment there?
>
> A. (Claimant) I'm not real sure when the insurance ended, but it ended just not long before I left. That is one of [the] reasons I had to leave, so I could find a job that had insurance.
>
> Q. When did you leave?
>
> A. I left in January of 2001.
>
> Q. 2000 --
>
> A. 2002.[5]

But on cross-examination, claimant agreed her insurance benefits continued until shortly before she left respondent's employment in January 2002.

> Q. (Mr. Finkelstein) And it [the insurance benefits] continued until shortly before you left D & A Market in, I think it was, January 2002.
>
> A. (Claimant) Yes.[6]

The record establishes that claimant lost her insurance benefits either around January 2001 at the earliest or around January 2002 at the latest. Claimant has the

[5] R.H. Trans. at 9.

[6] *Id.* at 21.

burden of proof in establishing her right to compensation.[7] As the record fails to establish that claimant's insurance benefits terminated before January 2002, the Board concludes the value of the employer-paid insurance should not be included in computing claimant's average weekly wage until January 2002. Accordingly, in determining claimant's compensation rate for any benefits due claimant before January 2002, claimant's average weekly wage is $273.06, which represents $270 ($6.75 per hour x 40 hours per week) straight time plus $3.06 overtime pay. The appropriate disability compensation rate for any benefits due claimant before January 2002 is $182.05.

Nature and extent of injury and impairment

On July 12, 2002, at her attorney's request, claimant saw Dr. Peter V. Bieri for an evaluation. Dr. Bieri diagnosed musculoligamentous strain and noted radiographic studies were consistent with bulging at the level of L4-5. The doctor concluded, utilizing the American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (AMA *Guides*) (4th ed.), that claimant sustained an 11 percent whole body functional impairment as a result of the August 4, 2000 back injury. The doctor further concluded claimant should be limited to light-medium type work, which restricted claimant, as follows:

> This would limit occasional lifting to 35 pounds, frequent lifting not to exceed 20 pounds, and no more than 10 pounds of constant lifting.[8]

But Dr. Bieri admitted he did not have any of Dr. Hamilton's medical records dated before September 7, 2000, which respondent and its insurance carrier contend establish that claimant was having both hip and low back problems long before the August 2000 lifting incident.

At respondent and its insurance carrier's request, on August 20 and September 17, 2002, claimant saw orthopedic surgeon Dr. Jeffrey T. MacMillan. Dr. MacMillan determined that claimant needed additional medical treatment but he was unable to determine if that treatment was related to claimant's August 2000 lifting incident as he believed claimant's initial symptoms improved but later recurred. Dr. MacMillan concluded claimant had a 10 percent whole body functional impairment under the AMA *Guides* (4th ed.) but that five percent preexisted the August 2000 lifting incident and the remaining five percent was caused by something that occurred after the August 2000 incident. The doctor testified, in part:

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[7] K.S.A. 44-501(a).

[8] Bieri Depo. at 8.

> Q. (Mr. Finkelstein) What opinions did you change -- or did these records cause you to change?
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> A. (Dr. MacMillan) What the records reflect is that Ms. Voiers appears to have had not only back pain but radicular symptoms prior to the August 4 injury. And that would suggest that apportioning her impairment to an antecedent cause would be appropriate.
>
> Q. Okay.
>
> A. And for that reason, I indicated that the 10-percent impairment should be split 5 percent preexisting and 5 percent to whatever the etiology was for her development of the radicular complaints.
>
> Q. Okay. And --
>
> A. Subsequent to the August 4, 2000, event.[9]

Accordingly, Dr. MacMillan did not feel claimant sustained any functional impairment as a result of the August 2000 lifting incident. In making that determination, Dr. MacMillan concluded that claimant's radicular symptoms did not appear until a long period after the August 2000 incident. But on cross-examination, Dr. MacMillan was forced to acknowledge that claimant had radicular symptoms down into her right leg and a positive straight leg raising test shortly after the incident. Also, on cross-examination the doctor admitted that he had no history or knowledge of any incident or accident that claimant allegedly sustained after her August 2000 lifting incident. Moreover, the doctor testified that the change in symptoms that he believed claimant experienced may not have been caused by any subsequent incident or accident. The doctor testified, in part:

> There may not be an incident. It may just be a change that occurred with no specific causation. People's symptoms change over time.[10]
>
> . . . .
>
> An intervening event is one possibility. The other possibility is simply that her condition changed spontaneously. . . . And that is the most likely.[11]

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[9] MacMillan Depo. at 25-26.

[10] *Id.* at 40.

[11] *Id.* at 43.

Claimant's chiropractor, Dr. Patrick E. Murray, also testified. Dr. Murray first saw claimant on April 8, 2002, for intense low back pain and symptoms in her right leg. The history the doctor obtained from claimant is somewhat nebulous as it includes a description of her August 2000 lifting incident. But the history also includes a vague statement that could be interpreted that claimant had recently squatted and felt a pop in her back followed by increased symptoms down into her right leg. Nonetheless, Dr. Murray testified that claimant related her primary complaints to her August 2000 lifting incident.

Dr. Murray also opined that if claimant did experience increased pain from squatting and bending down on the Saturday before seeing him on April 8, 2002, the incident would have merely exacerbated a preexisting chronic condition.

Considering the entire record, the Board affirms the Judge's finding that claimant now has an 11 percent whole body functional impairment rating as a result of the August 4, 2000 accident. But the Board also finds that claimant's permanent partial general disability award should be reduced by five percent due to preexisting functional impairment.[12] Dr. MacMillan's testimony is uncontradicted that claimant had a five percent whole body functional impairment before the August 2000 accident. And uncontradicted evidence that is reasonable and credible cannot be disregarded unless it is shown to be untrustworthy.[13]

Only Dr. MacMillan reviewed claimant's medical records that were compiled by Dr. Hamilton commencing in early 1998 while he treated claimant's preexisting hip and low back symptoms.

Although the Board is compelled to accept Dr. MacMillan's opinion regarding claimant's preexisting functional impairment, the Board rejects the doctor's opinion that claimant did not sustain any permanent injury or permanent functional impairment due to her August 2000 lifting incident. Moreover, contrary to respondent and its insurance carrier's contention, the Board is not persuaded claimant sustained a subsequent injury to her low back in April 2002 shortly before seeing Dr. Murray.

Based upon the above, claimant is entitled to receive permanent partial general disability benefits under K.S.A. 44-510e for a six percent whole body functional impairment, which represents the present 11 percent whole body functional impairment less the five percent that preexisted.

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[12] See K.S.A. 44-501(c).

[13] See *Anderson v. Kinsley Sand & Gravel, Inc.*, 221 Kan. 191, 558 P.2d 146 (1976).

Unauthorized medical expense

Claimant testified that Dr. Murray did not limit his chiropractic treatments to the low back. Instead, the doctor also treated claimant's upper and mid back under the belief she was experiencing problems in those areas because she was attempting to guard her low back. Further, Dr. Murray's testimony is uncontradicted his charges were reasonable and customary. Moreover, the doctor testified he only charged claimant for the lumbar treatment.

> That's -- that's exactly right. And I might add that some doctors will -- will charge for each area. In essence, I -- if that's the case, I didn't charge any fees for the cervical spine or the thoracic. I just charged for lumbar, which is a fee that would be for one primary area.[14]

The Board affirms the Judge's conclusion that respondent and its insurance carrier should either pay Dr. Murray's outstanding chiropractic charges or reimburse claimant for the payments that she has made on those bills as unauthorized medical compensation up to the $500 statutory maximum.[15] The Board finds Dr. Murray provided treatment for the low back injury that claimant sustained while working for respondent. The Board also finds that Dr. Murray's charges relate to claimant's low back treatment and that those charges were reasonable and customary.

AWARD

WHEREFORE, the Board modifies the September 18, 2003 Award, as follows:

Amy Lou Voiers is granted compensation from D & A Market and its insurance carrier for an August 4, 2000 accident and resulting disability. Based upon an average weekly wage of $273.06, Ms. Voiers is entitled to receive 11.71 weeks of temporary total disability benefits at $182.05 per week, or $2,131.81, plus 24.90 weeks of permanent partial general disability benefits at $182.05 per week, or $4,533.05, for a six percent permanent partial general disability, making a total award of $6,664.86, which is all due and owing less any amounts previously paid.

The Board adopts the remaining orders set forth in the Award that are not inconsistent with the above.

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[14] Murray Depo. at 43.

[15] See K.S.A. 44-510h(b)(2).

IT IS SO ORDERED.

Dated this ____ day of January 2004.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Paul D. Post, Attorney for Claimant
Victor B. Finkelstein, Attorney for Respondent and its Insurance Carrier
Brad E. Avery, Administrative Law Judge
Anne Haught, Acting Workers Compensation Director